Assuming, however, that such injunctions are bad by common law principles, a further question arises whether the situation has been changed by the Sherman Act prohibiting combinations or conspiracies in restraint of trade or interstate commerce. If railroad employees were engaged in interstate commerce, a concerted strike would undoubtedly fall within the terms of the Act. But they are not so engaged. They are engaged in supplying labor to their employers, and, in theory at least, they are no more in interstate commerce than are the dealers who supply other commodities necessary for the running of a railroad. While it must be acknowledged that a strike tends almost necessarily to impede interstate commerce, such a result is purely incidental. The duty to the public is owed by the employers alone, not by the employees. See *People* v. *N. Y., etc., R. R.*, 28 Hun (N. Y.) 543. Thus it would seem that the Sherman Act cannot reasonably be considered to apply to strikes of such a nature. The law being as it is, the dissolution of the injunction in the principal case can be regarded only with satisfaction.

RECENT CASES.

ADMIRALTY — SALVAGE CLAIM BY OWNER OF OFFENDING VESSEL — LIMITATION OF LIABILITY. — A barge, sunk by fault of a tug, was raised by other vessels belonging to the owners of the tug. The tug-owners took the statutory proceedings to limit their liability to the value of the tug, and then claimed salvage for raising the barge. *Held*, that they are not entitled to salvage. *The Pine Forest*, 119 Fed. Rep. 999 (Dist. Ct., R. I.).

Where such services are rendered by the vessel at fault, no salvage is recoverable. See *The Clarita*, 23 Wall. (U. S. Sup. Ct.) 1, 18. In such cases, the courts apparently personify the vessel as the wrongdoer and hold her disqualified from claiming salvage. See *The Glengaber*, L. R. 3 A. & E. 534. This doctrine is obviously inapplicable where the assistance is rendered by vessels other than the offender. In those cases, therefore, the services could clearly, apart from statutes allowing limitation of liability, be set up in reduction of damages, or, it would seem, optionally by way of cross-action. See *The Glengaber*, *supra*. That the defendant avails himself of such statutes, should not deprive him of these rights. The contrary view plainly discourages such services, and involves the injustice of allowing the injured party to recover the full statutory damages and also to profit by the unremunerated labor of vessels under no legal duty to perform it. Obviously, however, the owners of the offending vessel should not be allowed as salvage a sum greater than their limited liability; for otherwise they would be permitted to make actual profit from their wrong.

BANKRUPTCY — DISSOLUTION OF LIENS — EXECUTION SALE WITHIN FOUR MONTHS. — A judgment was obtained against an insolvent debtor within four months of the filing of the petition in bankruptcy. His property was sold on execution, but before the return day of the writ the petition was filed. *Held*, that under § 67 *f* of the National Bankruptcy Act, the trustee in bankruptcy is entitled to the proceeds of the sale in the sheriff's hands. *Clarke* v. *Larremore*, 23 Sup. Ct. Rep. 363, affirming the decision of the Circuit Court of Appeals, *sub nom. In Re Kenney*, 105 Fed. Rep. 897.

The proceeds of an execution sale in the sheriff's hands before the return day of the writ cannot, according to the weight of authority, be attached as the property of the execution creditor. *Turner* v. *Fendall*, 1 Cranch (U. S. Sup. Ct) 117; but see *Wehle* v. *Conner*, 83 N. Y. 231. Nor is the sheriff generally subject to garnishment in a suit against the creditor. *Marvin* v. *Hawley*, 9 Mo. 378. Until the writ is returned it is not fully executed and the creditor has no absolute claim to the proceeds. See FREEMAN, EXECUTIONS 577. Consequently the decision under discussion seems correct in holding that the right of the execution creditor, under such circumstances, is a lien rendered null and void by § 67 *f*. There have been, however, contrary decisions. *Re Seebold*,

105 Fed. Rep. 910; *Doyle* v. *Hall*, 86 Ill. App. 163. The court expressly refrains from stating an opinion as to the right of a trustee in bankruptcy to proceeds if already paid over to the execution creditor. However, the court's assertion that all liens within four months become null from their inception upon adjudication of bankruptcy, indicates that the drastic treatment of preferential payments by the Act may even be extended to entitling the trustee in such a case. See *Levor* v. *Seiter*, 69 N. Y. Supp. 987.

BANKRUPTCY — PREFERENCES — EQUITABLE MORTGAGE OF PERSONALTY. — The bankrupt, more than four months before the petition was filed, mortgaged by an unrecorded agreement all his property, present and to be acquired, to the defendant. Within four months of the filing of the petition, the defendant, having reasonable cause to know of the debtor's insolvency, took possession of all the bankrupt's property. There were no creditors who could have annulled the transfer. *Held*, that the trustee in bankruptcy can avoid the transaction. *Mathews* v. *Hardt*, 79 N. Y. App. Div. 570.

In New York a mortgage of after-acquired property creates an equitable lien. *Perley* v. *Dwight*, 132 N. Y. 59; *cf. N. Y. Security Co.* v. *Saratoga, etc., Co.*, 159 N. Y. 137. The defendant's right would thus seem to have been unimpeachable, on the principle that a trustee takes subject to all the equitable liens that affected the bankrupt. *Philadelphia* v. *Eckels*, 98 Fed. Rep. 485. To avoid giving the equitable lien or a preference in the distribution of assets, however, the court disregarded this principle and held that the defendant's right accrued only when he took possession of the property. But the doctrine of *Holroyd* v. *Marshal* is that the equitable lien attaches when the mortgagor's title accrues. See 13 HARV. L. REV. 598. Strictly therefore the equitable mortgagee should have a prior right to at least all property acquired by the mortgagee more than four months before the petition. In a conflict between the rights of the equitable mortgagee and of the general creditors the general policy in bankruptcy proceedings is favorable to the latter; but theoretically it is difficult to support the decision in the principal case.

BILLS AND NOTES — FORGED CHECKS — DRAWEE'S RIGHT TO RECOVER. — A bank cashed over its counter, without inquiry or identification, certain checks presented by an unknown man. The drawee paid the checks apparently without negligence. It appeared later that they were forged. *Held*, that the drawee may recover the money he has paid from the bank which cashed the checks. *Bank* v. *Bingham*, 71 Pac. Rep. 43 (Wash.). See NOTES, p. 514.

BILLS AND NOTES — NEGOTIABILITY — WAIVER OF DEFENSE. — A joint and several promissory note contained a clause that "no time given to or security taken from or composition or arrangement entered into with either party hereto shall prejudice the rights of the holder to proceed against any other party." *Held*, that this does not invalidate the instrument as a promissory note. *Kirkwood* v. *Carroll*, 19 T. L. R. 253 (Eng., C. A.).

A promissory note, to be negotiable, must contain an unconditional promise to pay, not coupled with an independent promise to do anything else. A waiver of defenses, however, does not qualify the promise to pay, but rather strengthens it. Thus, it is held that a note coupled with a power of attorney to confess judgment if not paid at maturity is negotiable. *Osborn* v. *Hawley*, 19 Oh. 130. The result is the same when the maker waives exemptions and the right of appeal. *Zimmerman* v. *Anderson*, 67 Pa. St. 421; *contra, Bank* v. *Wheeler*, 75 Mich. 546. The principal case would seem to be analogous and the decision, therefore, sound. Although the stipulation here discussed is not included in the English Bills of Exchange Act among those stated as not invalidating a note, the court holds the provision of the Act not to be exclusive. *Yates* v. *Evans*, 61 L. J. Q. B. 446; *contra, Kirkwood* v. *Smith*, 1 Q. B. 582. The American act resembles the English on this point. Neg. Inst. Law, §§ 3, 5.

CONFLICT OF LAWS — CAPACITY TO CONTRACT — COVERTURE AS DEFENSE. — A married woman, incapable of contracting in Tennessee, made while resident there a promissory note. The note was sent by mail to a bank in Ohio, where a married woman may contract, in renewal of a note conceded to have been binding on her. Suit was brought on the renewal note in Tennessee. *Held*, that although there is a good contract by the law of Ohio, coverture is nevertheless a good defense in Tennessee. *First Nat'l Bank* v. *Shaw*, 70 S. W. Rep. 807 (Tenn.).

Ordinarily when a note is sent by mail by the maker to the payee the contract is made at the place of mailing. *Barret* v. *Dodge*, 16 R. I. 740. But when a note is in renewal, the contract is made at the place at which the first note is taken up. *Staples*

v. *Nott*, 128 N. Y. 403. This would seem a better ground for holding the note in the principal case an Ohio contract, than that taken by the court, namely, that Ohio is the place of performance. Since by the common law capacity to contract depends on the *lex loci contractus*, the contract here is a binding obligation. *Milliken* v. *Pratt*, 125 Mass. 374. Generally a valid contract will be enforced in a foreign state even if it could not there have been made legally binding. *Greenwood* v. *Curtis*, 6 Mass. 351. But the domestic law may refuse to give the contract effect if contrary to domestic public policy. *Emery* v. *Burbank*, 163 Mass. 326. As to whether it is against public policy, in a state where married women are incapable of contracting, to enforce contracts made by them abroad, opinions may well differ. *Cf. Milliken* v. *Pratt, supra; contra, Armstrong* v. *Best*, 112 N. C. 59.

CONFLICT OF LAWS — GUARDIANS AND ADMINISTRATORS — INSURANCE POLICIES. — On the death of a member of a beneficiary society a domiciliary guardian of the infant beneficiaries, and an ancillary guardian, who had possession of the insurance certificate, were appointed in different states. The latter guardian brought suit on the certificate first, but the former thereafter obtained judgment and payment, each having proceeded in the state of his appointment. *Held*, that the right of the ancillary guardian is barred. *Modern Woodmen of America* v. *Hester*, 71 Pac. Rep. 279 (Kan.).

The assumption of the court that a domiciliary administrator or guardian though not in possession of the insurance policy has the exclusive right to sue, has little support. *Accord, Ellis* v. *Northwestern M. L. I. Co.*, 100 Tenn. 177; *contra, Sulz* v. *Mutual R. F. L. Assn.*, 145 N. Y. 563. Some courts hold that either the domiciliary administrator, or the ancillary administrator in possession of the policy may sue, but that a pending action by one should bar the other on the principle of comity. See *Sulz* v. *Mutual R. F. L. Assn.*, *supra*. On general principles, either administrator may enforce a claim against the company as a debtor within his jurisdiction. In an action on an insurance policy, however, the plaintiff must produce the policy or satisfactorily account for it. The ancillary administrator has rightful possession of the policy and his right to sue seems perfect. If that is admitted, it would seem that the domiciliary administrator could not properly account for the non-production of the policy. Accordingly, in some jurisdictions the ancillary administrator is given an exclusive right to sue. *New York L. Ins. Co.* v. *Smith*, 67 Fed. Rep. 694. Under this view the decision of the principal case is incorrect since payment to the wrong claimant is no defense in the absence of special equities. See *Steele* v. *Connecticut G. L. I. Co.*, 31 N. Y. App. Div. 389; but *cf. Bull* v. *Fuller*, 78 Ia. 20.

CONFLICT OF LAWS — TERRITORIAL LAWS — PLACE OF IMPRISONMENT. — A statute of the United States provides that the legislative assemblies of the several territories may contract for the imprisonment in other territories and states of their convicts. The legislature of Oklahoma accordingly passed an act authorizing its governor to make such a contract with the proper authorities of some state. Under this law a contract was made with the directors of the Kansas penitentiary. The petitioner, an Oklahoma convict, confined in the Kansas penitentiary according to this arrangement, sued out a writ of *habeas corpus*. *Held*, that the writ should not be granted. *In re Terrill*, 71 Pac. Rep. 589 (Kan.).

But for the federal statute the detention of the petitioner would appear to be improper, for he would then undeniably be confined beyond the jurisdiction of the laws under which he is punished. *Regina* v. *Lesley*, 8 Cox C. C. 269. Such imprisonment, however, has been erroneously justified under the constitutional requirement that full faith and credit be given the judicial proceedings of other states. *In Re Maney*, 20 Wash. 509; see 12 HARV. L. REV. 567. But the principal case holds that the detention is warranted by virtue of the federal statute. The dissenting judges take the view that Congress merely granted permission to pass territorial laws, disregarding the futility of such laws, to authorize the detention of convicts beyond their jurisdiction. But the disposition of the case seems on the whole satisfactory. Had Congress enacted directly that Oklahoma convicts should be confined in states designated by the territorial governor, the petitioner's imprisonment would be unassailable. See *Ex parte Karstendick*, 93 U. S. 396. It is reasonable to regard this federal statute also as legalizing detention in states designated by the governor, though it becomes operative only when the territorial assemblies act under its provisions.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — VESTED RIGHT IN ALIMONY, — In 1892 the plaintiff obtained a decree of absolute divorce and annual alimony from the defendant. A statute passed in 1900 provides that the courts may subsequently vary decrees awarding alimony "whether heretofore or hereafter rendered." (N. Y.

Laws, 1900, c. 742.) In 1902 the defendant sought a reduction in the amount. *Held*, that in so far as the statute is retroactive it violates the constitutional provision against depriving a person of property without due process of law. *Livingston* v. *Livingston*, 173 N. Y. 377.

In a decree for separation the basis of the right to permanent alimony is only the common-law right of the wife to support, for the decree does not terminate the marriage relation and the incidental property rights are not affected. *Taylor* v. *Taylor*, 93 N. C. 418. Hence in the ecclesiastical courts the amount might be varied as the circumstances of the parties required. *Cox* v. *Cox*, 3 Add. 276. See *DeBlaquiere* v. *DeBlaquiere*, 3 Hag. Ecc. 322, 329. Such a claim to alimony would not seem to constitute a vested right. Absolute divorce, on the other hand, and the rights incidental to it are purely statutory. See 1 BL. COM. 441; 2 BISHOP, MAR. DIV. & SEP. § 1039. As it terminates the marriage relation the property rights incidental to that relation are entirely destroyed. *Barrett* v. *Failing*, 111 U. S. 523. Hence in this case the basis of the decree for permanent alimony is the loss of these property rights as well as the right to support. *Calame* v. *Calame*, 24 N. J. Eq. 440. Such a decree, like ordinary judgments, cannot subsequently be varied by the court unless at the time of divorce this power is conferred by statute or reserved in the final decree. *Walker* v. *Walker*, 155 N. Y. 77; *Howell* v. *Howell*, 104 Cal. 45. In the principal case, accordingly, it would seem that the wife's interest was vested, and therefore not subject to subsequent statutory restriction.

CONSTITUTIONAL LAW — EMINENT DOMAIN — RIGHTS OF LIGHT AND AIR INFRINGED BY ELEVATED TRAINS. — The defendant was directed by statute (N. Y. Laws, 1892, c. 339) to lay its tracks upon an elevated structure constructed for it by the state in place of an open subway which it had previously used. Both the subway and the viaduct were in a public street the fee of which belonged to the city. The plaintiff, an abutting owner, brought action for injury to his rights of light, air, and access, from the running of the elevated trains. *Held*, that the plaintiff has no cause of action. *Muhlkes* v. *N. Y. & Harlem R. R. Co.*, 173 N. Y. 549. Bartlett and Van, JJ., dissenting.

For a discussion of the principles involved, see 15 HARV. L. REV. 665.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — LOTTERY TICKETS. — The plaintiff was indicted for causing lottery tickets to be carried from Texas into California in violation of the Act of Congress of 1895. He applied for a writ of *habeas corpus* on the ground that the Act is unconstitutional. *Held*, that the Act is constitutional. *Champion* v. *Ames*, 23 Sup. Ct. Rep. 321. See NOTES, p. 508.

CONSTITUTIONAL LAW — RESTRAINT OF INTERSTATE COMMERCE — INJUNCTION AGAINST BEEF TRUST. — A number of dealers, controlling sixty per cent of the interstate commerce in fresh meats in the United States, entered into an agreement restraining their bidding against each other for live stock, much of which was sent from other states than that in which the bidding was done. They further agreed to regulate among themselves the prices of meat to be sold in other states, and the charges for the cartage and delivery of it, and made arrangements with common carriers for unfair discrimination in rates. To a bill for a preliminary injunction, filed under the Sherman Anti-Trust Law, the defendants interposed a demurrer. *Held*, that the injunction should be granted. *United States* v. *Swift & Co.*, 35 Chi. L. News 236, decided Feb. 18, 1903, Circ. Ct., N. D. Ill.

It has been held that a mere combination of sugar refiners, with no agreement as to the dispositions of products, does not affect interstate commerce. *United States* v. *Knight Co.*, 156 U. S. 7. But when there is an agreement by which free competition in the sale of the products in the several states is restrained, as in the principal case, this is within the federal jurisdiction. *Addyston Pipe and Steel Co.* v. *United States*, 175 U. S. 211. There are *dicta* that the Sherman Act applies to all contracts directly restraining inter-state commerce in any degree, whether the common law would regard them as unreasonable and void or not. See *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290. But no contract clearly legal at common law has yet been held to violate the Sherman Act, and there may be some doubt whether the courts would so hold. The Texas courts refuse to apply a similar local statute to a case of reasonable restraint. *Welch* v. *Phelps, etc., Windmill Co.*, 89 Tex. 653. Even at common law, however, a combination to regulate prices, as in the principal cases, by dealers largely controlling the market, is void. *Central Ohio Salt Co.* v. *Guthrie*, 35 Oh. St. 666.

CONSTITUTIONAL LAW — TAXATION — STATE INHERITANCE TAX ON NON-RESIDENT'S CHOSES IN ACTION. — The plaintiff's testator, a resident of Illinois, had a deposit in a New York bank and credits against New York citizens. An in-

heritance tax on their devolution was laid under a New York statute. (3 Rev. Stat. Codes & Gen. Laws, 3d ed. 1901, p. 3592.) *Held*, that the statute is constitutional. *Blackstone* v. *Miller*, 23 Sup. Ct. Rep. 277.

It is well settled that inheritance taxes on tangible chattels, both at the domicile of the owner and at their *situs*, are constitutional. *Callahan* v. *Woodbridge*, 171 Mass. 595; see *Eidman* v. *Martinez*, 184 U. S. 578, 586. If, then, the deposit and credits are to be regarded as chattels in New York, the decision is correct. A *dictum* in a former case considered all choses in action as taxable only at the domicile of the creditor. *State Tax on Foreign-Held Bonds*, 15 Wall. (U. S. Sup. Ct.) 300. This *dictum* has, however, been questioned, and to-day the authority of the case appears to be reduced to the exact point decided, that the *situs* of specialty obligations is the *situs* of the instrument. See *New Orleans* v. *Stempel*, 175 U. S. 309, 319. Thus in garnishment proceedings a debt may be reached if there is jurisdiction over the debtor. *Chicago R. I. & P. R. R. Co.* v. *Sturm*, 174 U. S. 710. It has already been decided that a bank deposit of a non-resident is taxable at the *situs* of the bank. *New Orleans* v. *Stempel*, *supra*. The square statement in the principal case that jurisdiction over the debtor gives the right to tax a simple debt has at least the merit of furnishing a definite rule in a subject in which there has been much confusion. See 15 HARV. L. REV. 680.

CONTRACTS — OFFER AND ACCEPTANCE — STOPPAGE BY TELEGRAM OF LETTER OF ACCEPTANCE. — The person to whom an offer for the sale of land was made, mailed a letter of acceptance. Changing his mind, he recalled the letter by telegram. *Held*, that a binding contract was made by the mailing of the letter. *Scottish-American Mortg. Co.* v. *Davis*, 72 S. W. Rep. 217 (Tex., Civ. App.).

For a discussion of the principles involved, see 7 HARV. L. REV. 301.

CONTRACTS — PROMISE FOR BENEFIT OF THIRD PARTY — RELEASE BY PROMISEE. — The defendant contracted with X to pay the plaintiff a sum of money. X later released the defendant from his obligation, the plaintiff having had no notice of the original contract. *Held*, that the release is no bar to an action at law by the plaintiff on the contract. *Tweeddale* v. *Tweeddale*, 93 N. W. Rep. 440 (Wis.).

For a discussion of the principles involved, see 15 HARV. L. REV. 799.

CONTRACTS — REPUDIATION — DOUBTS OF SOLVENCY. — The plaintiff agreed to ship the defendant goods on June 1, payment to be made November 10. A part of the goods were so shipped, but the plaintiff, doubting the solvency of the defendant, refused to send the residue, although the defendant authorized shipment with draft attached to the bill of lading. In an action to recover the price of the goods sent, the defendant sought to set off his damages from non-receipt of the residue. *Held*, that instructions by the lower court allowing the plaintiff to repudiate the contract if he actually believed the defendant insolvent are erroneous. *Kavanaugh Mfg. Co.* v. *Rosen*, 92 N. W. Rep. 788 (Mich.).

In general, where the acts of one party to a contract have made it reasonably certain he will not perform, the other party is said to be excused from performance. See *Ziehen* v. *Smith*, 148 N. Y. 558. But just what acts are sufficient is not clearly settled. Actual insolvency may not be, for the trustee in bankruptcy has the right, and may desire, to perform the contract. *Gibson* v. *Carruthers*, 8 M. & W. 333. It would not seem unreasonable to throw on the trustee the burden of giving notice of intent to perform, although the law appears to be contrary. *Gibson* v. *Carruthers*, *supra*. If this be law with regard to actual bankruptcy, it would seem *a fortiori* that in the absence of any overt act of insolvency mere doubt, however reasonable, as to the financial condition of the other party would not justify refusal to perform. This is the decision in *Publishing Co.* v. *Butler*, 159 Mass. 517. It has been held in cases of actual insolvency that the seller may refuse to deliver except for cash, although the contract provides for delivery on credit. *Ex parte Chalmers*, L. R. 8 Ch. App. 289. But this seems never to have been extended to cases of mere belief in the buyer's insolvency.

CONTRACTS — STATUTE OF LIMITATIONS — ACKNOWLEDGMENT OF DEBT. — *Held*, that mere acknowledgment of indebtedness is insufficient to remove the bar of the statute of limitations. *Wood* v. *Merrietta*, 71 Pac. Rep. 579 (Kan.); *Lambert* v. *Doyle*, 43 S. E. Rep. 416 (Ga.). See NOTES, p. 517.

CORPORATIONS — INTERCHANGE OF STOCK — MUTUAL CONTROL. — An arrangement was made between two corporations through which, by the sale of the directors' personal shares in the first corporation and the issue of stock by the second, each corporation would own a majority of the stock of the other. It was then provided that the annual meetings of the first corporation should be held before those of the second, so that the directors of the former should always elect those of the latter, who in turn would

re-elect the old board of the former. Minority stockholders of the first corporation sue to restrain the execution of the plan. *Held*, that the injunction will be granted. *Robotham* v. *Prudential Ins. Co.*, 53 Atl Rep. 842 (N. J., Ch.). See NOTES, p. 510.

CORPORATIONS — RIGHT OF STOCKHOLDER TO SUE ON BEHALF OF CORPORATION. — The president, who was also director of a corporation, sold corporate property at a fraudulent price. A bill to recover the property was brought by a stockholder, who alleged *inter alia* that before action by the directors or corporation could be obtained, the property would be removed beyond the jurisdiction of the court. The defendant demurred. *Held*, that the bill will lie. *Teris* v. *Hammersmith*, 66 N. E. Rep. 79 (Ind., App. Ct.).

A stockholder clearly has no legal action against a director who is damaging the corporate assets. *Smith* v. *Hurd*, 12 Met. (Mass.) 371. In equity, however, if the acts of misconduct have not been executed but are merely threatened, a stockholder should always be allowed an injunction. See 1 MOR. CORP. 2d ed. § 250. Where recovery for past misconduct is sought, if the corporation has power to ratify the wrongful acts, the stockholder's bill should show an attempt to move the directors and the corporation. *Foss* v. *Harbottle*, 2 Hare 461. Though theoretically this would seem unnecessary when the act is *ultra vires*, even then the stockholder must allege an attempt to move the corporation and its directors. *Hawes* v. *Oakland*, 104 U. S. 450. If, however, a stockholder can show that a request would be nugatory, or that irreparable damage would ensue before the directors and corporation could act, such application is not required. *Brewer* v. *Boston Theatre*, 104 Mass. 378. Since the allegations in the principal case seem to show that immediate action was necessary to prevent irreparable damage, the bill was properly supported.

CRIMINAL LAW — PROCEDURE — PRIVATE EMPLOYMENT OF ASSISTANT PROSECUTOR. — *Held*, that an attorney employed and compensated by private parties may assist the prosecuting officer in a criminal trial. *State* v. *Tighe*, 71 Pac. Rep. 3 (Mont.). See NOTES, p. 513.

DAMAGES — DUTY OF UNITED STATES TO AVOID DAMAGES — LOSS OF TREASURY NOTES BY GOVERNMENT AGENT. — The superintendent of a United States mint received certain treasury notes. The notes, while in his custody, were destroyed by fire without his fault. Action was brought by the United States on his official bond. *Held*, that the United States may recover the face value of the notes. *Smythe et al.* v. *United States*, 23 Sup. Ct. Rep. 279.

The decision involves the holding that the government need not issue new notes to avoid damages. In general, the law requires an injured party to avoid damages so far as possible, even by affirmative acts. *Pennsylvania R. R. Co.* v. *Washburn et al.*, 50 Fed. Rep. 335; 1 SEDG. DAM. 8th ed. § 201 *et seq.* No grounds of policy are apparent sufficiently strong to exempt the government from this duty, even though an act of its legislative branch might be a prerequisite. Moreover, it is not clear that substantial damage was ever sustained, especially since it is fairly arguable that title to the so-called notes was in the United States, and that, consequently, they were not outstanding obligations. *Harmer* v. *Steele*, 4 Exch. Rep. 1. Under this view, *a fortiori*, recovery should not be measured by the face value. It is true that these documents, whether actually in circulation as notes or not, would render the government liable to a *bona fide* purchaser. *Worcester County Bank* v. *Dorchester Bank*, 10 Cush. (Mass.) 488. It might, therefore, be urged that public policy forbids the custodian of such documents to raise any inquiry as to the method of loss. Where, however, the facts are undisputed, such a rule seems more harsh than public policy demands.

EQUITY — FRAUD WITHOUT DAMAGE — AVOIDANCE OF DEED. — The plaintiff orally contracted with his neighbors not to sell his residence to anyone who would apply it to an objectionable use. The defendant desired to buy for such a use. On the refusal of the plaintiff to sell, the defendant employed an agent who obtained a deed by fraudulently representing that he was purchasing for an unobjectionable third person. Although the plaintiff had received his own price for the land, he brought a bill to have the deed set aside for the fraud. *Held*, that the deed will be set aside, although no damage to the plaintiff appeared. *Brett* v. *Cooney*, 53 Atl. Rep. 729 (Conn.). See NOTES, p. 509.

EQUITY — INJUNCTIONS — STRIKERS IN PUBLIC SERVICE COMPANIES. — A railroad company sought to restrain certain labor leaders from causing a peaceful strike among its employees. *Held*, that a temporary injunction will be granted. *Wabash R. R.*

Co. v. *Hannahan*, 56 Cent. L. J. 201, decided Mar. 3, 1903, Circ. Ct., E. D. Mo. [The injunction was dissolved April 1. — ED.] See NOTES, p. 518.

EQUITY — SPECIFIC PERFORMANCE — MUTUALITY OF REMEDY. — A wife who had grounds for divorce from her husband and was living apart from him agreed to condone his offence and to resume marital relations in consideration of his promise to convey property to trustees for the benefit of their children. The wife returned to her husband, and on his refusal to convey the property she brought a bill for specific performance. *Held*, since the agreement was executed on the wife's side, there is no lack of mutuality and specific performance will be decreed. *Moayon et al.* v. *Moayon*, 72 S. W. Rep. 33 (Ky.).

For a discussion of the principles involved, see 16 HARV. L. REV. 72.

INTERPRETATION OF STATUTES — TARIFF LAW — RIGHTS OF DEFRAUDED VENDOR. — An act of Congress provides that if any owner, importer, consignee, agent or other person shall attempt to smuggle merchandise into the country, it shall be forfeited. (U. S. Comp. St. 1901, p. 1895.) Under this statute the government seized diamonds which a fraudulent purchaser was attempting to smuggle into the country. *Held*, that the defrauded vendor cannot reclaim the diamonds from the United States. *Five Hundred and Eighty-one Diamonds* v. *United States*, 119 Fed. Rep. 556 (C. C. A., Sixth Circ.).

The government cannot take free of the vendor's equity on the ground of being a *bona fide* purchaser. *Cf. Easter* v. *Allen*, 90 Mass. 7; BENJ. SALES, 7th ed. § 433. Accordingly, the case must be supported, if at all, because it falls within the express words of the statute. Despite this fact, previous decisions would seem to show that the harsh result reached is unnecessary. Thus, under this statute, an innocent owner does not lose property smuggled into the country by his bailee. *United States* v. *1150½ Lbs. of Celluloid*, 82 Fed. Rep. 627. Similarly, under the internal revenue laws, the government holds forfeited property subject to mechanic's liens. *United States* v. *Distillery, etc., of McCoy*, Fed. Cas. No. 14,964. The fact that a defrauded vendor's claim is merely equitable seems a distinction of little weight. Thus, when trust property was forfeited for the trustee's felony, the crown took subject to the trust. See LEWIN, TRUSTS, 9th ed. 265. It is true that in some cases, such as piracy, public policy demands that even an innocent owner should forfeit his property. *United States* v. *Brig Malek Adhel*, 2 How. (U. S. Sup. Ct.) 210. In the principal case, however, the demands of policy appear no stronger than in the case of property smuggled into the country by a bailee.

JUDGMENTS — CONSTRUCTIVE NOTICE — IDEM SONANS. — The defendant obtained a judgment against one Sibert which was recorded under the name of Seibert. The plaintiff having bought land from Sibert, sought an injunction restraining the defendant from selling it on execution, claiming that he had no constructive notice of the defendant's judgment against Sibert. *Held*, that the names being *idem sonans* the injunction will not be granted. *Green* v. *Myers*, 72 S. W. Rep. 128 (Mo., Ct. App.).

It is generally held that if a mortgage be properly left for recording every one will be treated as having constructive notice, even though it was never actually recorded. *Throckmorton* v. *Price*, 28 Tex. 605. This seems to be based on the theory that the necessity of recording cuts down a mortgagee's common law rights. Accordingly, if he does his duty by leaving the mortgage for record, he should be protected. A judgment, on the other hand, must be so recorded that it will be discovered by any one making a reasonable search. *Etna, etc., Co.* v. *Hesser*, 77 Ia. 381; *Phillips* v. *McKaig*, 36 Neb. 853. The explanation of this rule may be that the modern judgment lien on land has no existence as regards others than the judgment debtor unless they have either constructive or actual notice of the judgment. *Cf.* BLACK, JUDG. 2nd ed. §§ 398, 404. Under the rule requiring substantial correctness in recording a judgment the principle of *idem sonans* is important only because similarity in sound tends to cause a search under different spellings. In the principal case, however, though the names were *idem sonans*, the difference in spelling was so likely to mislead that a more just result would probably have been attained by requiring greater exactness. *Cf. Davis* v. *Steeps*, 87 Wis. 472.

MORTGAGE — EQUITABLE MORTGAGES — PRIORITIES. — A trustee of land under a resulting trust in favor of the plaintiff mortgaged the premises. The plaintiff brought suit to enforce the trust. Before adjudication, the trustee obtained a loan to discharge the mortgage, promising to execute a new mortgage to the lender. The mortgage was discharged and the agreement was executed. Thereafter the trustee, to remove the mortgage last executed, borrowed money from the defendant in this suit, executing to

him a new mortgage. Later the preceding mortgage was discharged. In the pending suit, the trustee was ordered to convey the premises to the plaintiff, who now seeks to have the defendant's mortgage declared a cloud on his title. *Held*, that the plaintiff is entitled to the property free from the defendant's mortgage. *Bigelow* v. *Scott*, 33 So. Rep. 546 (Ala.).

The mortgages executed after suit was begun against the trustee were postponed to the plaintiff's equity under the doctrine of *lis pendens*. Nevertheless the court states that the holder of the intermediate mortgage was equitably entitled to priority. This result can be reached only on the ground that on the discharge of the earliest mortgage the legal title reverted to the trustee on a trust in favor of the man who advanced his money to remove the prior encumbrance. See *Eyre* v. *Burmester*, 10 H. L. Cas. 90; 15 HARV. L. REV. 863. It would seem that the defendant might likewise be entitled to a constructive trust of the equitable rights of the mortgagee whose debt was discharged with his advance. But since in the principal case the original equitable claimant has rightfully acquired the legal title, the decision of the court can be supported. *Peacock* v. *Burt*, 4 L. J. Ch. N. S. 33.

MORTGAGES — FORFEITURE OF LIEN — TENDER OF PAYMENT AFTER DEFAULT. — In Missouri, where the lien theory of mortgage obtains, a tender was made by the mortgagor of land after the day set for payment. *Held*, that this does not forfeit the mortgage lien, but stops the running of interest. *Knollenberg* v. *Nixon*, 72 S. W. Rep. 41 (Mo.).

In jurisdictions where the English view that the mortgagee has legal title prevails, a tender after default does not destroy the mortgagee's security. *Rowell* v. *Mitchell*, 68 Me. 21. Among the lien theory jurisdictions, however, the cases are squarely in conflict upon the effect of tender. Those which hold that the mortgage is thereby destroyed treat the right as an ordinary lien. *Kortwright* v. *Cady*, 21 N. Y. 343. The cases which reach the opposite result refuse, upon grounds of hardship, to follow out the lien theory. *Matthews* v. *Lindsay*, 20 Fla. 962. The principal case establishes this latter view in Missouri. This illustrates the tendency of the courts to cling to the common law conception of mortgage when a strict analogy to liens leads to apparently undesirable results. Other instances of this tendency are the survival of the mortgagee's rights when the debt is barred by a discharge in bankruptcy or by the statute of limitations. *Roberts* v. *Wood*, 38 Wis. 60; *Heyer* v. *Pruyss*, 7 Paige (N. Y., Ch.) 465. The decision that the tender stopped the running of interest is clearly sound. *Loomis* v. *Knox*, 60 Conn. 343.

PROCEDURE — DIRECTING VERDICT — INCREDIBILITY OF EVIDENCE. — In an action for libel the plaintiff, a "magnetic healer," introduced many witnesses who testified that they had been cured by his treatment. The trial judge refused to direct a verdict for the defendant. *Held*, that this is error since the jury could not reasonably believe witnesses swearing to what the court knew to be an impossibility. *Weltman* v. *Bishop*, 71 S. W. Rep. 167 (Mo.). See NOTES, p. 515.

PROCEDURE — FEDERAL JURISDICTION — CORPORATION INCORPORATED BY TWO STATES. — The defendant railroad company, originally incorporated in Virginia, had also been required to incorporate in Kentucky by filing a copy of its franchise. Suit was brought against it, as a local corporation, in a Kentucky court. *Held*, that the action cannot be removed to a federal court. *Davis' Admr.* v. *Chesapeake & O. R. R. Co*, 70 S. W. Rep. 857 (Ky.).

Where a corporation, chartered by two or more states, was a party to a suit in one of them, it seems formerly to have been regarded, for the purposes of jurisdiction, as a citizen of the state in which the suit was brought. *Railway Company* v. *Whitton*, 13 Wall. (U. S. Sup. Ct.) 270, 283; see 12 HARV. L. REV. 350. The present view appears to be that a company once incorporated by a state, remains a citizen of that state, and cannot become a citizen of another state, merely by being declared by the latter a domestic corporation. *Louisville, etc., R. R. Co.* v. *Louisville Trust Co*, 174 U. S. 552; *Calvert* v. *Southern R. R. Co.*, 41 S. E. Rep. 963 (S. C.). The result of the re-incorporation, however, is admittedly the formation of a new and distinct corporation. *Indianapolis, etc., Ry. Co.* v. *Vance*, 96 U. S. 450. The principal case draws the conclusion that either corporation may be chosen, to sue or to be sued, and that upon this choice depends the question of citizenship. But this would seem to be rather a question of fact as to which corporation is involved. Any determination of this would, as a general rule, be impracticable; while to leave the matter to the option of the plaintiff, as in the principal case, seems unjust. The qualification imposed by the federal rule, upon the theory of distinct corporate existence, is, therefore, thought to be sound.

PROCEDURE — FEDERAL JURISDICTION — REMOVAL OF CAUSES. — An act of Congress provides that where suit is brought in any state court, "in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the circuit court of the United States" upon showing local prejudice or influence. (U. S. Comp. St. 1901, p. 509.) The plaintiffs, citizens of Colorado, brought suit in a Colorado state court against the defendants, one a citizen of Colorado, the other a citizen of West Virginia. The latter made an application to remove the case. *Held*, that the cause cannot be removed, since the co-defendant of the applicant is a citizen of the same state as the plaintiffs. *Campbell et al.* v. *Milliken et al.*, 119 Fed. Rep. 982 (Circ. Ct., D. Col.).

The first part of the clause in question is copied from the local prejudice act of March 2, 1867. 14 Stat. 558. Under this act all parties on one side had to be citizens of different states from any party on the other side and had to unite in the petition for removal. *Sewing Machine Cases*, 18 Wall. (U. S. Sup. Ct.) 553. Most of the circuit courts have held, contrary to the principal case, that the present clause, as changed to "any defendant," requires merely the petitioning defendant to be of different citizenship. *Whelan* v. *New York, L. E. & W. R. R. Co.*, 35 Fed. Rep. 849; *contra*, *City of Terre Haute* v. *Evansville & T. H. R. R. Co.*, 106 Fed. Rep. 545. It would seem, however, that the effect of this change is to give the right of removal to any one of the defendants without altering the requirement that all the defendants be citizens of other states from any party plaintiff. The provision in the act that the other defendants may be remanded, if as to them the suit can be justly determined in the state court, may be explained as applicable to other defendants, although their citizenship differs from that of the parties plaintiff. Further, the view contrary to that of the principal case would allow the removal of suits not within the jurisdiction of the circuit courts originally. See U. S. Comp. St., 1901, p. 508; *Construction Co.* v. *Cane Creek*, 155 U. S. 283. This interpretation seems questionable. See *In Re Pennsylvania Co.*, 137 U. S. 451, 454; *Arkansas* v. *Kansas, etc., Coal Co.*, 183 U. S. 185, 188.

PROPERTY — ACCRETION — EMERGENCE OF TOTALLY SUBMERGED LAND. — In an action of ejectment it appeared that the plaintiff's lot was formerly separated from the Mississippi River by another lot. The plaintiff offered to prove that the latter had been gradually but totally submerged by the river, but had afterwards gradually emerged, forming the land in dispute. *Held*, that the evidence is irrelevant, since the plaintiff could acquire by accretion no title to the land beyond his original boundary. *Stockley* v. *Cissna*, 119 Fed. Rep. 812 (C. C. A., Sixth Circ.).

The principal case accords with the few authorities directly in point. *Ocean City Assn.* v. *Shriver*, 64 N. J. Law 550. On principle, however, the decision would seem unsound. The land in dispute was situated in Tennessee, and it is settled in this jurisdiction that the fee in the bed of navigable rivers is in the state. *Goodwin* v. *Thompson*, 15 Lea (Tenn.) 209. When land is gradually submerged by a river the former owner retains no rights in it, and the owner of the river bed acquires the absolute title. *Wallace* v. *Driver*, 61 Ark. 429; *Foster* v. *Wright*, L. R. 4 C. P. D. 438. In the principal case, therefore, while the land was submerged, the title was in the state and the owner's rights were extinguished. Being thus extinguished, it is difficult to see how they could revive. The plaintiff, on the other hand, has by the gradual and total submergence of the other lot become a riparian owner. *Welles* v. *Bailey*, 55 Conn. 292. It would seem, therefore, that he became entitled to the land, as it emerged, by the riparian owner's well recognized right to accretion. *Posey* v. *James*, 7 Lea (Tenn.) 98.

PROPERTY — ESTATES — LEASE FOR LIFE DETERMINABLE AT WILL OF LESSEE. — In an agreement to lease certain premises at a stated weekly rent the lessor promised not to give notice to quit so long as the lessee paid the rent regularly. *Held*, that this is an agreement for a lease for the lessee's life determinable at the lessee's option, and subject to the condition of regular payment of the rent. *Zimbler* v. *Abrahams*, 19 T. L. R. 189 (Eng., C. A.).

Though the law bearing on this subject may be regarded as well settled, the case is interesting because of the unusual facts presented. An ordinary tenancy at will may be terminated by the lessor as well as the lessee. CO. LIT. 55 a; *Richardson* v. *Langridge*, 4 Taunt. 128. In the principal case, on the other hand, the parties have, in effect, expressly agreed that the estate shall be terminated only by the lessee. Since there is no reason for not giving effect to this provision, the lessee is thus entitled to an estate for life determinable at his option. See LEAKE, DIG. LAND LAW, 207. Such estates, though very unusual, have been recognized in both England and America. CO. LIT. 42 a; *Doe d. Warner* v. *Browne*, 8 East 165; *Warner* v. *Tanner*, 38 Oh. St. 118.

PROPERTY — LIEN OF BOARDING-HOUSE KEEPER — PROPERTY NOT BELONGING TO BOARDER. — A statute provides that the keepers of inns and boarding-houses shall have a lien on property brought upon their premises by guests; but that such lien shall not exist if the keeper of the inn or boarding-house has notice, when the property is brought, that it is not legally in the possession of the guest. (N. Y. Laws, 1897, c. 418, § 71.) A boarder brought on the premises of a boarding-house keeper property belonging to the plaintiff. The boarding-house keeper had no notice concerning the true ownership of the goods. *Held*, that the latter has no lien on the property for the debt incurred by the boarder. *Barnett* v. *Walker*, 39 N. Y. Misc. 323 (Sup. Ct.).

At common law an innkeeper had a lien on property brought by a guest even though the right of possession was in a third party, provided the innkeeper was unaware of this fact. *Robinson* v. *Walter*, 3 Bulst. 269; *Jones* v. *Morrill*, 42 Barb. (N. Y.) 623. A boarding-house keeper, on the other hand, had no lien. *Cochrane* v. *Schryer*, 12 Daly (N. Y.) 174. The present New York statute gives the same lien to both innkeepers and boarding-house keepers. According to the express terms of the statute this lien would seem to attach even to goods not belonging to the boarder. In reaching an opposite conclusion the court argues that the interpretation just suggested would make the statute inconsistent with the constitutional provision concerning due process of law. The same suggestion appears in *dicta* of two other courts. See *Wyckoff* v. *South Hotel Co.*, 24 Mo. App. 382; *McClain* v. *Williams*, 11 S. Dak. 227, 230. Since, however, in the case of innkeepers a lien of equal scope has been firmly established at common law, the statutory extension of that lien to boarding-house keepers would seem to be within the spirit as well as the letter of the constitution. *Cf. Munn* v. *Illinois*, 94 U. S. 113, 134; *Reilly* v. *Stephenson*, 62 Mich. 509.

PROPERTY — RELIGIOUS SOCIETY — CONTROL OF PROPERTY ON DIVISION OF MEMBERSHIP. — An unincorporated religious society was entitled to use certain property under a trust. A majority of this society seceded, incorporated as a church of a different denomination, and assumed control of the property. The minority, claiming to constitute the original society, seek to enjoin the majority from using the property. *Held*, that the minority are entitled to the property in question, and the majority will be enjoined. *Cape et al.* v. *Plymouth Congregational Church et al.*, 93 N. W. Rep. 449 (Wis.).

For a discussion of the principles involved, see 10 HARV. L. REV. 184; 12 *ibid.* 509.

SURETYSHIP — VARIATION OF RISK — PRINCIPAL OBLIGATION PROVIDING FOR CHANGE. — A building contract, upon which the defendant was surety, contained a provision that the employer might direct changes in the building as the work went on. He directed a material change, with the builder's consent. *Held*, that such a change is not included in the provisions of the contract, and that therefore the surety is discharged. *Erfurth et al.* v. *Stevenson*, 72 S. W. Rep. 49 (Ark.). See NOTES, p. 511.

TORTS — CARE OF EXPLOSIVES — DELEGATION TO AGENT. — An engineer who had been entrusted with railroad torpedoes by the defendant company placed one on the track and for his own amusement exploded it in order to frighten a child. The child was injured by a piece of the flying metal. *Held*, that the railroad company is responsible. *Euting* v. *Chicago & N. W. R. R. Co.*, 92 N. W. 358 (Wis.).

The court holds, as a matter of agency, that the servant's failure properly to exercise his duty of caring for a dangerous article rendered the company liable. But the decision would seem to rest upon a rule of torts rather than of agency. Unless the company itself owed the plaintiff a duty to see that the torpedoes were properly cared for, it is difficult to see how it can be responsible. In the absence of such a duty, certainly no principle of agency can make the company liable merely because of the employment of a servant and his failure to fulfil his duty to the company. Such a duty is imposed by the law of torts upon one who controls a dangerous instrumentality. That it should be a continuous duty resting upon him personally, and to be delegated to another only at his peril, seems reasonable, though this application of it may be harsh. There is considerable authority in accord. *Pittsburg, etc., R. R. Co.* v. *Shields*, 47 Oh. St. 387. See 15 HARV. L. REV. 406. One case, however, is directly *contra*. *Smith* v. *New York, etc., R. R. Co.*, 78 Hun (N. Y.) 524.

TORTS — DUTY OF OCCUPIER OF LAND — BUSINESS VISITOR NOT ON THE LAND. — The defendants had negligently permitted a shooting gallery to be operated in so faulty a manner, upon their exhibition grounds, that a bullet struck and killed the plaintiff's decedent, who was standing near by, waiting to enter the grounds. *Held*, that the deceased being a business visitor, the plaintiff can recover. *Thornton* v. *Maine State Agricultural Society*, 53 Atl. Rep. 979 (Me.). See NOTES, p. 516.

TORTS — JOINT TORT FEASORS — RELEASE OF ONE WITH RESERVATION OF RIGHTS AGAINST OTHERS. — Upon consideration of the payment of a sum of money the plaintiff gave to several of a number of joint tort feasors an instrument purporting to release them absolutely, but reserving the plaintiff's rights against the other joint tort feasors. The plaintiff subsequently brought an action against some of the joint tort feasors not named in the instrument. *Held*, that this instrument is merely a covenant not to sue the joint tort feasors named, and therefore does not discharge the others. *Gilbert* v. *Finch*, 173 N. Y. 455.

This decision is important as involving a question concerning which the decisions in New York are conflicting. See *Matthews* v. *Chicopee Mfg. Co.*, 3 Robt. (N. Y.) 711; *Delong* v. *Curtis*, 35 Hun (N. Y.) 94; *Smith* v. *Consolidated Gas Co.*, 72 N. Y. Supp. 1084. It does not appear whether or not the instrument in the principal case was under seal. That a sealed release of one discharges all others jointly liable has long been recognized. See 6 BAC. ABR. 7th ed. 625, tit. Release (G). It is held, however, in England and in several American jurisdictions that, if the instrument reserves the right to pursue others jointly liable, it is merely a covenant not to sue and is not a release. *Price* v. *Barker*, 4 E. & B. 760; *Berry* v. *Gillis*, 17 N. H. 9. Though this construction is strained, it gives effect to the ultimate intention of the parties and therefore seems justifiable. Several American courts, however, have held that such a reservation is of no effect because repugnant to the release expressed. *Gunther* v. *Lee*, 45 Md. 60. A parol settlement purporting to effect a release is almost everywhere held not to discharge others jointly liable, unless the payment received was intended as a complete satisfaction of the claim. *Ellis* v. *Esson*, 50 Wis. 138; *contra*, *Mitchell* v. *Allen*, 25 Hun (N. Y.) 543; *Smith* v. *Consolidated Gas Co.*, *supra*. The New York decisions on this point at least would seem virtually overruled by the decision of the principal case.

TORTS — MALICIOUS PROSECUTION — FORMER ACQUITTAL AS EVIDENCE OF LACK OF PROBABLE CAUSE. — In an action for malicious prosecution the plaintiff introduced evidence of his acquittal in the criminal trial. *Held*, that such evidence cannot be considered for the purpose of establishing want of probable cause. *Bekkeland* v. *Lyons*, 72 S. W. Rep. 56 (Tex., Sup. Ct.).

As a condition to recovery the plaintiff must show a favorable termination of the prosecution instituted by the defendant. *O'Brien* v. *Barry*, 106 Mass. 300. See 14 HARV. L. REV. 223. There is some confusion as to whether the evidence of this fact may be considered for the additional purpose of establishing want of probable cause. Properly the question appears to be purely one of logical relevancy. From this point of view there are two classes of previous proceedings. In the first, fall those proceedings in which the issue is the probable guilt of the accused. Evidence of the favorable termination of such proceedings would seem relevant; for example, the discharge by a magistrate at a preliminary hearing. *Frost* v. *Holland*, 75 Me. 108; *contra*, *Israel* v. *Brooks*, 23 Ill. 575. The second class consists of those proceedings in which the probable guilt of the accused has not been in issue; for instance, where the prosecution has been abandoned. *Braveboy* v. *Cockfield*, 2 McMull. (S. C.) 270. The principal case would seem to fall within the latter class, for the acquittal tends to show only a failure to prove guilt beyond a reasonable doubt. The confusion in the cases arises because of a failure to distinguish between these two classes. The principal case is supported by the weight of authority. *Eastman* v. *Monnastes*, 32 Ore. 291; *contra*, *Christian* v. *Hanna*, 58 Mo. App. 37.